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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45

COMMENTS OF AT&T CORP.

Pursuant to the Commission's *Notice*,[1] AT&T Corp. ("AT&T") submits these comments concerning the confidential treatment of wire center line count data for wire centers that do not receive support from the Commission's high-cost universal service support mechanism for non-rural carriers.

INTRODUCTION

A local exchange carrier's wire center line count data are unquestionably "commercial or financial" information as that term is used in the Freedom of Information Act ("FOIA"). And, at least with respect to competitive local exchange carriers, disclosure of such line count data by the Commission would likely cause substantial competitive harm by providing entrenched incumbent carriers with the information necessary to target areas and customers where new entrants are attempting to make competitive inroads. These line count data, therefore, fall squarely within Exemption 4 of FOIA (5 U.S.C. § 552(b)(4)) and Section 0.457(d) of the Commission's rules, and should not be disclosed in the absence of "a compelling public interest

[1] Public Notice, *Common Carrier Bureau Seeks Comment On Requests For Confidential Treatment Of Wire Center Line Count Data*, DA 00-1068, CC Docket No. 96-45 (May 12, 2000) ("*Notice*").

in disclosure." *See Federal-State Joint Board on Universal Service*, FCC 00-125, CC Docket No. 96-45, Order, ¶ 11 (rel. April 7, 2000) ("*Confidentiality Refusal Order*").[2]

The public does, of course, have a compelling interest in preserving competitive neutrality, competition, and the integrity of the universal support mechanism. Accordingly, the Commission properly ruled that the public interest benefits of disclosing statewide carrier-by-carrier support amounts and the per-line support amounts available in wire centers that receive support outweigh the significant public and private costs associated with the resulting disclosure of this information, even though carriers' wire center line counts can be determined from these data. *Confidentiality Refusal Order*, ¶¶ 13 & 20.

For wire centers (or carriers) that do not receive high-cost support, however, there are no per-line or carrier support amounts – and hence no need to divulge information that has the effect of revealing carrier line counts. Indeed, with respect to competitive carrier line count data for wire centers that do not receive support, there is *no* countervailing public interest benefit that could justify disclosure of line count data and the accompanying competitive harm. Disclosure of competitive carriers' wire center line count data in these circumstances could only harm their competitive positions, reduce competition, and frustrate the Commission's stated goal of competitive neutrality.

The calculus for incumbent carrier data is quite different. Indeed, there are reasons to disclose incumbent LECs' line counts that are entirely independent of whether a particular incumbent receives universal support. For instance, the Commission's Synthesis Model relies on line count estimates to size the network in the fundamental cost calculations for universal service

[2] *See also Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, 13 FCC Rcd. 24816, ¶ 2 (1998) ("*Confidentiality Order*").

support.[3] To the extent that actual wire center line count data that are submitted to the Commission by incumbent LECs are used for such estimates, the public has a strong interest in disclosure of that data (subject to appropriate protective order conditions) in order to protect the integrity of the universal support mechanism.[4]

ARGUMENT

I. LINE COUNT DATA AT THE WIRE CENTER LEVEL ARE CONFIDENTIAL COMMERCIAL OR FINANCIAL INFORMATION WITHIN THE SCOPE OF EXEMPTION 4 OF FOIA.

As the Commission has explained, the term "commercial information" is given its "ordinary meaning" under Exemption 4 of FOIA. *Notice* at 3. And federal courts have long recognized that for the purposes of Exemption 4 the ordinary meaning of the phrase "commercial information" includes, at a minimum, materials regarding a firm's "basic commercial operations." *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983). Wire center line count data easily satisfy this definition. Such data can reveal core information regarding a carrier's commercial operations. Indeed, a competitive LEC's wire center line count data reveal its strategic market position, entry strategy, its ability to provide services in particular geographic areas, and even the quality of the services that the carrier can

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[3] *See Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Twentieth Order on Reconsideration, ¶ 6 (rel. April 7, 2000) ("line counts were used in the model to estimate non-rural carriers' forward-looking costs of providing the services eligible for universal service support").

[4] Although the Commission currently relies on estimates for line count data for use in its Synthesis Model to calculate costs, the Commission has explained that it plans to incorporate actual line count data collected from LECs into its cost calculations. Indeed, the Commission has already collected line count data for this purpose. *See Federal-State Joint Board on Universal Service, et al.*, CC Docket Nos. 96-45 & 97-160, Order, ¶ 1 (rel. July 19, 1999) ("*Line Count Order*") (collecting line count data from carriers "to be used in the forward-looking cost mechanism").

provide.[5] Such line count data also reveal "financial information." Indeed, the Commission collects wire center line count data precisely because of the financial information they provide – *i.e.*, information regarding the costs associated with providing communications services. *Confidentiality Refusal Order*, ¶ 6.

It is equally clear that wire center line count data are "confidential" for the purposes of Exemption 4 of FOIA. As the Commission notes, commercial information is "confidential" if its disclosure would "cause substantial harm to the competitive position of the person from whom the information was obtained." *Confidentiality Order*, ¶ 4. A carrier "need not show 'actual competitive harm'; evidence revealing '[a]ctual *competition* and the likelihood of substantial competitive injury' is sufficient to bring commercial information within the realm of confidentiality." *Public Citizen* at 1291 (D.C. Cir. 1983) (quoting *Gulf & Western Industries v. United States*, 615 F.2d 527, 530 (D.C. Cir. 1980)).[6]

Competitive local exchange carriers obviously face competition from the incumbent providers in the markets they are attempting to enter. And the D.C. Circuit has explained that disclosure of information that "would provide competitors with valuable insights into the operational strengths and weaknesses of a [company]" threatens exactly "the type of competitive

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[5] Notably, the Commission has held that information that is much less directly related to a carrier's core operations constitutes "commercial information." *See, e.g., Mobile Relay Associates; Requests for Confidential Treatment of Materials Submitted in Conjunction with Pending Applications*, 14 FCC Rcd. 18919 (1999) (customer records); *Southern Company; Request for Waiver of Section 90.629 of the Commission's Rules*, 14 FCC Rcd. 1851 (1998) (telecommunications carriers' lists of construction sites and other construction information); *Marcus Cable Associates v. Texas Utilities Electric Co.*, 12 FCC Rcd. 10362 (1997) (telecommunications carriers' contracts with third parties); *In the Matter of Thomas N. Locke*, 8 FCC Rcd. 8746 (1996) (telecommunications carriers' lease agreements).

[6] *See also Landfair v. U.S. Department of the Army*, 645 F. Supp. 325, 328 (D.D.C. 1986) (same).

harm envisioned in Exemption 4."[7] Thus, courts and the Commission treat, as confidential, information that would "assist[] competitors in preparing marketing strategies to use in direct competition with [another telecommunications carrier]."[8]

Access to competitive carrier wire center line count data would unfairly assist incumbent LECs in precisely this manner. Such line count data can reveal the location of a carrier's customers, the services that the carrier offers those customers, and, most importantly for new carriers, the areas in which the carrier is targeting its limited resources.[9] Armed with this information, incumbents could easily target facility upgrades, new service offers and marketing efforts to areas with the highest concentration of competitive carrier activity or success, thereby frustrating their competitive efforts. An incumbent could also use competitive carriers' wire center line count data in gerrymandering proposed UNE rate zones to increase potential competitors' costs in areas where those competitors are making the greatest inroads. For these

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[7] *Public Citizen Health Research Group v. Food & Drug Administration*, 185 F.3d 898, 905 (D.C. Cir. 1999) (internal quotations omitted) (citing and quoting *National Parks v. Kleppe*, 547 F.2d 673, 684 (D.C. Cir. 1976)).

[8] *Southwestern Bell Telephone Company*, Tariff FCC No. 73, FCC Rcd. 16418 (1996); *see also Burke Energy Corp. v. Dep't. of Energy*, 583 F.Supp. 507 (D. Kansas 1984) (protecting materials because their disclosure "would enable competitors to solicit" the information owners' customers); *National Rural Telephone Cooperative on Request for Inspection of Records*, 5 FCC Rcd. 502, ¶ 12 (1990) (finding that "disclosure of [certain] contracts . . . could result in substantial competitive harm" because it would "provide other carriers with key contractual provisions that they can use in tailoring competitive strategies."); *MCI Telecommunications Corp., On Request for Inspection of Records*, 58 Rad. Reg. 2d (P&F) 187, ¶ 8 (1985) (finding information to be confidential because release of the information would "enable competitors to determine AT&T's forecast of future volume, for its switches by specific location").

[9] *Notice* at 2, n.5; *Confidentiality Refusal Order*, ¶ 10 & n.22. And Courts have recognized that this type of information, including market share data, is confidential. *See, e.g., Sterling Drug, Inc. v. Federal Trade Commission*, 450 F.2d 698, 709 (D.C. Cir. 1971).

reasons, AT&T and other new entrants carefully guard the confidentiality of such line count information and do not release such data to the public.[10]

II. LINE COUNT DATA AT THE WIRE CENTER LEVEL SHOULD ONLY BE RELEASED FOR CARRIERS RECEIVING HIGH-COST SUPPORT AND WHERE THE DATA ARE USED IN THE COMMISSION'S SYNTHESIS MODEL.

Because wire center line count data are confidential commercial or financial information, public disclosure by the Commission is generally inappropriate. The Commission is especially "sensitive to ensure that the fulfillment of its regulatory responsibilities does not result in the unnecessary disclosure of information that might put its regulatees at a competitive disadvantage." *Notice* at 4. Accordingly, "the Commission generally has exercised its discretion to release to the public competitively sensitive information in limited circumstances, such as where the Commission has identified a compelling public interest in disclosure." *Confidentiality Refusal Order*, ¶ 11.

There are only two situations where the public interest benefits of publicly disclosing wire center line count data outweigh the public and private costs of releasing that information. First, as the Commission recently explained, information that reveals line count data must be disclosed for wire centers that receive high-cost universal service support in order to preserve competitive neutrality, protect competition and competitors, and to ensure the integrity of the universal support mechanism. *See Confidentiality Refusal Order*, ¶¶ 14-18. Second, incumbent

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[10] Although incumbent carriers have stressed to the Commission that their wire center line count data are likewise highly competitively sensitive, *see, e.g., Confidentiality Refusal Order*, ¶ 10 n.22 (citing letters from U S WEST, Sprint and GTE), incumbents do not, in fact, face the same competitive position concerns. In contrast to such data for competitive LECs, little, if any, information about an incumbent's entry or marketing strategy can be gleaned from an incumbent's wire center line count data, because the incumbent already serves virtually all customers throughout its service area.

wire center line count data should also be disclosed to other carriers (subject to any appropriate protective order conditions) where the data are used in the Commission's Synthesis Model to properly size the network in the fundamental cost calculation.[11] The Commission has specifically recognized that disclosure of line count data used in the Commission's Synthesis Model is necessary to ensure the core integrity of the universal service mechanism. *See Federal-State Joint Board on Universal Service*, 12 FCC Rcd. 8776, 8915, First Report and Order, ¶ 250 (1997).[12] Indeed, the Commission, in rejecting a black box approach to the universal service mechanisms, explained that "*all underlying data* . . . associated with the model must be available to all interested parties for review and comment [and] . . . *[a]ll underlying data should be verifiable*." *Id.* ¶ 250(8)-(9) (emphasis added). Thus, in these limited circumstances, the public interest benefits of releasing line count data substantially outweigh any private or public costs.

By contrast, *no* public interest benefits could flow from releasing competitive carriers' line count data at the wire center level for wire centers that do *not* receive high-cost universal service support and where that data are *not* used in the Commission's Synthesis Model to properly size the network in fundamental cost calculations. Rather, as discussed above,

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[11] *See* n.4, *supra.* To the extent that the Commission adopts the use of actual wire center line count data submitted by competitive LECs in the Synthesis Model's cost calculations, that data should be disclosed only on an aggregate basis and subject to appropriate protective order conditions. In this way, the Commission can ensure that the data used in estimating the costs of providing telecommunications services are subject to scrutiny while minimizing the competitive harm to non-incumbent LECs.

[12] Indeed, several carriers appear to have recognized as much. In July 1999, the Commission sought line-specific wire center data from 15 carriers for the purposes of improving the forward-looking cost mechanism. *See Line Count Order* ¶¶ 1-5. Although the Commission has not yet incorporated these data into its Synthesis Model, the Commission specifically explained that carriers who believe that this information should not be disclosed for inspection by other carriers should designate their submission as "Confidential Information." *Id.* ¶ 9. Several carriers, including U S WEST and Ameritech, perhaps in recognition of the strong public interest in verifying the data, did not seek confidential treatment of their submissions.

disclosure of competitive carriers' wire center line count data in such circumstances could only harm those carriers by providing incumbents with information that would allow them to impede competitive entry by strategically targeting certain areas and customers and attempting to gerrymander UNE rate zones.

CONCLUSION

For the foregoing reasons, the Commission should limit disclosure of wire center line count data to instances where the wire center receives universal service support or where the data are submitted by an incumbent carrier for use in the Commission's Synthesis Model.

Respectfully submitted,

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